SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1109

JESUS CANALES, EDUARDO C. RESENDEZ and ARTHUR M. BAROS,

Petitioners,

v.

CITY OF ALVISO and CITY OF SAN JOSE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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January 12, 1974

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The petitioners, Jesus Canales, Everado C. Resendez and Arthur M. Baros, respectfully pray that a writ of certiorari issue to review the judgment of Court of

Appeal of the State of California, First Appellate District, Division One, entered in this proceeding on August 21, 1973, with Petition for Writ of Certiorari denied by the Supreme Court of the State of California on October 18, 1973.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, following the first trial of this matter is reported at 3 C.3d 118, 474 P.2d 417 (1970) and the opinion of the Court of Appeal, following the second trial, 1 Civil No. 31,783 appears in the appendix submitted under separate cover.

JURISDICTION

The judgment of the Court of Appeals of the State of California, First Appellate District, Division I was made and entered on August 21, 1973. A petition for hearing of this matter by the Supreme Court of the State of California was denied by order made and entered on October 18, 1973. The jurisdiction

of this Court is invoked under 28 U.S.C. § 1257(3), in that the validity of State statutes is drawn in question of the ground of its being repugnant to the Constitution of the United States, and a right is claimed under the constitution of the United States.

QUESTIONS PRESENTED

1. Whether, in an Election Contest, following an election in which illegal offers of consideration were made to voters, a requirement by state law that the contestants must prove not only that the offers were made, but that they determined the outcome of the election denies the contestants, and the minority faction, the equal protection of the laws.
2. Whether, in an Election Contest, in which illegal votes equal to the margin of victory were established by contestants, a requirement of state law that contestants establish that the illegal

votes were cast in favor of the winning side and determined the result of the election, denies the contestants, and the minority faction, the equal protection of the laws.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Consitution of the United States:

Section 1 --- No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves sections of the Election Code of the State of California which are set forth in the appendix submitted separately.

STATEMENT OF THE CASE

On three occasions between the years 1960 and 1968, the City of San Jose attempted to consolidate with the City of Alviso. Twice consolidation was defeated at the polls. The third election, on January 9, 1968, was successful, and is the one being contested in this action. The election board tallied a total of 369 ballots as properly marked. Of that number, it counted 189 for consolidation, 180 opposed (CT 413).

Evidence was introduced as to the domicile of twenty-two (22) challenged voters. Of that number, the Court found that nine (9) electors were illegal voters. Eight (8) of the nine (9) had signed a petition that the City of Alviso be consolidated with the City of San Jose (RT 85, 103, 104, 176, 186 428, 658, 759). At the conclusion of trial the Court found that four (4) of the illegal votes were cast against the consolidation, two (2) were cast in favor of consolidation, and that

there was insufficient evidence as to how the remaining three (3) voted (CT 271, 272, 273).

The contestants introduced additional evidence that the City of Alviso is a small community of 1500 people located at the southern tip of the San Francisco Bay (RT 562) adjacent to the larger City of San Jose. A substantial number of the residents of Alviso are of Mexican descent and are poor. (RT 562, 567). Many of the low-income residents purchased their houses from areas of freeway construction outside Alviso and moved them to Alviso lots that they had been able to purchase for five dollars ($5.00) per lot (RT 562, 563). Building Codes in Alviso were never strictly enforced (RT 574), and residents did their own electrical wiring and plumbing work (RT 564).

The City of San Jose was deeply involved in the election campaign in support of consolidation. The City Manager Anthony P. Hammann promised civil service jobs to all employees of the City of Alviso (RT 333). In

addition, a promise was made to the volunteer firemen of Alviso that they would be hired by the City of San Jose, without the requirement of a Civil Service Examination (RT 376, 381). The fifteen (15) volunteers were told, however, that they would have little chance of getting a job if they were violently opposed to consolidation (RT 385). Alviso Fire Chief Perkins called a special meeting, attended by almost all of the volunteers to tell them of this offer (RT 385).

City Manager Hammann admitted at trial that if the volunteers were not being paid as employees by the City of Alviso, they were not entitled to jobs with San Jose, absent compliance with Civil Service Requirements (RT 334).

The City of San Jose also formed an alliance with an organization called the Alviso Improvement Corporation, whose purpose was to advocate consolidation with San Jose (RT 390).

On November 1, 1967, the Alviso Improve-

ment Corporation and the City of San Jose entered into a written contract, conditioned on consolidation (Exhibit 3). Paragraph 5 of this agreement assured Alvisians that the City Council of San Jose would "urge the City Manager and other enforcing agencies and officers of the City to use great caution in the exercise of their enforcement power, and to refrain from any action which would cause unnecessary hardship." The contract was then distributed door-to-door in English and Spanish (RT 567).

City Manager Hammann testified that it was a well known fact that housing in Alviso was substandard in many respects (RT 329), and that he met personally with the voters and guaranteed that absolutely no house would be torn down without giving owners a period of five (5) years to remedy any code deficiencies (RT 330). Alviso Councilman Tony Santos carried Hammann's guarantee door-to-door throughout Alviso (RT 567).

As to the additional evidence offered by contestants on the remaining grounds of contest, the court found that the defendants did not offer any employment, rewards or other valuable consideration to procure a favorable vote for consolidation or preclude any voter from expressing his views on consolidation (CT 273, 274). The court then rendered its judgment confirming the election (CT 291, 292).

The Federal questions sought to be reviewed by this Court were raised in the first trial of this matter (RT 413), on appeal to the District Court of Appeal (Appellant's Opening Brief, pp. 45, 52), and on Petition for Hearing to the California Supreme Court (Petition for Hearing, pp. 6, 8).

ARGUMENT

I

THE OFFERS OF JOBS TO VOLUNTEER FIREMEN AND PROMISES OF A FIVE YEAR MORITORIUM ON BUILDING CODE ENFORCEMENT

BY THE CITY OF SAN JOSE DENIED CONTESTANTS AND THE MINORITY FACTION EQUAL PROTECTION OF THE LAWS.

By offering remunerative employment to Alviso's volunteer firemen irrespective of their satisfying Civil Service Requirements, and by guaranteeing Alviso residents non-enforcement of building codes, San Jose clearly acted improperly and in a manner contrary to public policy. Indeed, under California law offers of consideration constitute grounds of an election contest. Cal. Elec. Code §§ 12004, 12005, 20021; Canales v. City of Alviso, 3 Cal.3d 118, 129, 474 P.2d 417, 89 Cal.Rptr. 601 (1970).

San Jose's impropriety is born out by the fact that no provision exists within the Charter of the city of San Jose (Exhibit 25) that would waive Civil Service Requirements for volunteer firemen. Moreover, by guaranteeing a five (5) year moritorium on enforcing ordinances governing dangerous

buildings in one area of the City only (Alviso), San Jose violated its own laws (RT 641), as well as the Fourteenth Amendment to the United States Constitution, which as explicated in Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220 (1886), requires that laws be enforced uniformly.

As this Court has repeatedly recognized, other rights, even the most basic, are illusory if the right to vote is undermined or diluted. Wesberry v. Sanders, 376 U.S. 1, 17, 11 L.Ed.2d 481, 491 (1964). This being so, the Supreme Court has provided broad and pervasive protection to the right of a voter to an "equally effective voice," especially where discriminatory state action is subtle and difficult to detect. In Williams v. Rhodes, 393 U.S. 23, 21 L.Ed.2d 24 (1968), the State of Ohio had carefully devised its election laws to make it virtually

impossible for a new political party, even one comprised of thousands of members, to be placed on the State ballot to choose electors pledged to certain candidates in presidential elections. A new party was required to obtain the signatures of qualified voters numbering 15% of the ballots cast at the last general election before being permitted to have its name printed on the ballot, while established parties (Republican and Democratic) were automatically placed on the ballot if they drew only 10% of the vote at the preceding election.

This Court held that the Ohio statutes gave established parties a decided advantage over new parties, and thus placed substantial burdens on the right to vote and the right to associate by the minority faction. It was further determined that when unequal burdens of this nature have been imposed on minority groups:

> "....only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." NAACP v. Button, 371 U.S. 415, 433, 9 L.Ed.2d 405, 418 (1963). Williams, supra. at 31.

The Williams' principle has recently found expression in Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1972), a case closely analogous to the instant situation. There the plaintiffs alleged that incumbent officers of the City of Chicago and Cook County required City and County employees, as a condition of holding their jobs, to furnish votes, money, and campaign work to elect candidates selected by the Democratic Organization.

The United States Court of Appeals, citing Williams, held that the alleged misuse of official power over public employees so as to create a substantial political effort in favor of the "ins" and against

the "outs" impaired "the interest in an equal chance and an equal voice" entitled to constitutional protection.

This right to an equal voice is particularly important for a minority faction within any community because that faction is not only guaranteed, but must have, an equal chance to participate in its own government, regardless of whether it prevails. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 12 L.Ed.2d 568 (1964)) at 131. The California Supreme Courts' characterization of these offers as "competent estimates of the practical effect" of consolidation (Canales, supra at 132) and as tantamount to general campaign promises shirks reality in light of the locality, smallness and poverty of the affected area and the electorates' peculiar sensitively to inducements of this nature.

In the present case, no compelling state

interest can be advanced to sanction the actions of San Jose in violating public policy and the law to influence to any degree the outcome of the election in its favor. Nor do First Amendment interests in full and free discussion immunize election speeches and letters which, as here, contained express promises of a specific type of employment conditioned on a majority vote in support of consolidation. Cal. Elec. Code § 12003; cf. Canales, supra.

II.

ILLEGAL OFFERS OF VALUABLE CONSIDERATION SHOULD VOID AN ELECTION REGARDLESS WHETHER IT IS SHOWN THAT THE RESULT WOULD HAVE BEEN DIFFERENT WITHOUT THEIR INFLUENCE.

It is well settled that under the Fourteenth Amendment to the United States Constitution a voter has a right "to vote in elections without having his vote wrongfully denied, debased or diluted." Hadley v. Junior College District, 397 U.S. 50, 52,

25 L.Ed.2d 45, 49 (1970). It would appear that a citizen's vote may be as unconstitutionally debased by inducing votes with offers of valuable consideration as by stuffing ballot boxes with illegal votes. Further, no basis exists to distinguish issue elections from candidate elections in regard to the right to an equal vote. Canales, supra at 131. An equal voice in the election of a candidate is of no greater importance to a citizen than the equal weight of his vote in a ballot-measure election which may result in substantial and important changes in the status of his community, as in the present case.

Although the California Supreme Court in Canales, supra, rejects the distinction between issue and candidate elections, by requiring election contestants to demonstrate that the outcome of the election would have been different without the offers of considera-

tion the court has taken away with one hand that which it gave with the other. Whereas the court recognizes that there exists no statutory requirement for showing the causal relationship between the offer of consideration and the election's result when a candidates' election is contested (Canales, supra at 130), it divines, without support, such a requirement from the neutral language of California Elections Code §§ 20021(c) and 20089 when a ballot measure election is challenged. It is difficult to imagine a more impossible burden of proof than that which has here been imposed by the California Supreme Court on contesting electors. It strains credulity that the court would suggest that in order for election contestants to prevail they must parade a possibly indeterminate number of electors through the evidentiary procedures of the courts to determine whether each was influenced in his voting by the representations made.

In another context, this Court has patently rejected such an unwieldly proposition. In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 24 L.Ed.2d 593 (1970), where the exercise of fundamental rights essentially identical with those involved here was impaired by representations calculated to affect the outcome of an election in a fashion favorable to the party making such representations, the Supreme Court held that the defect complained of need only "have a significant propensity to affect the voting process" to render the election nugatory. Mills, supra at 384.

This holding, however, was clearly predicated upon a finding that the representations made were material, in that they were of such a character that they might have been considered important by a reasonable voter who was in the process of deciding how to vote. Mills, supra at 384.

Given the small rural community of fifteen hundred people involved in the present case which was plagued by poverty and sub-standard housing, San Jose's promise of good-paying jobs and guaranteed protection from the enforcement of building ordinances were unquestionably important to the electors of Alviso in deciding how to vote. Materiality being thus established, contestants have a fortiori satisfied their burden of proving the causal relationship required by this Court. As such, the illegal offers of valuable consideration proffered by San Jose to Alviso residents had a "significant propensity to affect the voting process" and thereby voided the election favoring consolidation.

III.

THE FOURTEENTH AMENDMENT REQUIREMENT OF "ONE MAN, ONE VOTE" REQUIRES AN ELECTION TO BE SET ASIDE WHERE THE NUMBER OF ILLEGAL VOTES CAST EQUALS THE DIFFERENCE BETWEEN THE WINNING AND LOSING TALLIES

In Reynolds v. Sims, 371 U.S. 533 (1964), this Court provided the right to vote in state elections with substantial Constitutional Protections, including protection from debasement or dilution of the weight of a citizen's vote. Since we are dealing with a fundamental freedom, it is well established that this Court must make an "independent review of the record." Norris v. Alabama, 294 U.S. 587 (1935); Haynes v. Washington, 373 U.S. 503 (1963); Edwards v. South Carolina, 372 U.S. 229; Jacobelin v. Ohio, 378 U.S. 184 (1964).

Contestants have likely had their vote prejudically diluted. Reynolds v. Sims, supra. The required petition to place the consolidation issue on the ballot, a petition that called on the City Council of Alviso to "do all in your power to consolidate" (Exhibits 2, 4, 5, and 6), was signed by eight (8) of the nine (9) illegal voters, and circulated by one of them.

The only legitimate state interest that could subordinate contestant's right that each vote count has been enunciated by California Courts: securing certainty in closely contested elections. Rideout v. City of Los Angeles, 185 Cal 426, (1921); Singletary v. Kelley, 242 C.A. 2d 611 (1966).

This rule developed at a time when there was no power in the courts to order a new election, and great injury would result from declaring the office vacant. McCrary, On Elections, (1880) 2d Ed. at 264-265. Such impediments to rendering an effective judgment no longer exist for the courts of today in election contests.

Moreover, counterbalancing the need for certainty in elections is the fact that election contests are rare. Even rarer are the occasions in which the number of votes found to have been illegally cast equals the difference in the result. The present case and Singletary v. Kelly, supra are the only

reported California cases we have discovered.

A rule requiring a new election on those remarkably rare occasions when the number of illegal votes equals the margin of victory would produce little uncertainty.

It is too facile to say that the trier should, and can, determine how the illegal votes were cast. To ask the question to the illegal voter provides too tempting an opportunity to perpetuate a fraud, since there is no extrinsic evidence by which contestants could impeach perjurious testimony. To require contestants to prove the illegal votes were actually cast for the winning side would result in no election being set aside.

Against the consideration of avoiding uncertainty in close elections, the dictate of the Fourteenth Amendment to secure an equal vote for each man weighs heavily. To confirm a candidate in office or a measure of law when

a substantial question lingers casts a shadow over the concept of self-determination.

The court below has confirmed an election in which there is a substantial likelihood that the majority of voters did not in fact vote for consolidation.

CONCLUSION

For the foregoing reasons, petitioners request that a writ of certiorari issue to review the judgment and opinion of the California District Court of Appeal.

Respectfully submitted,

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Dated: January 12, 1974 Attorneys for Petitioners

IN THE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Affidavit of Service

STEPHEN MANLEY, being first duly sworn under oath, deposes and says:

1. That on the 13th day of January, 1974, three copies of the Petition for Writ of

Certiorari were mailed, postage prepaid to:

CITY OF ALVISO
FABER L. JOHNSTON, ESQ.
1st Natl. Bank Bldg., #711
San Jose, CA 95113

CITY OF SAN JOSE
PETER G. STONE, ESQ.
City Attorney's Office
151 W. Mission St.
San Jose, CA 95110

2. That all parties required to be served have been served.

Subscribed and sworn this 13th day of January, 1974 at San Jose, California.

STEPHEN V. MANLEY

Subscribed and sworn to before me this 13th day of January, 1974 at San Jose, California.

NOTARY PUBLIC

5896 Chris Drive, San Jose, Calif. 95111

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APPENDIX

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CITY OF ALVISO and CITY OF SAN JOSE,

Respondents.

APPENDIX

California Election Code

Section 20021 - Grounds for contest

Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes:

(a) That the precinct board or any member thereof was guilty of malconduct.

(b) That the person who has been declared elected to an office was not, at the time of the election, eligible to that office.

(c) That the defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Chapter 3 (commencing at Section 12000) of Division 8 or Division 15, of this code.

(d) That illegal votes were cast.

(e) That the precinct board in conducting the election or in canvassing the returns,

made errors sufficient to change the result of the election as to any person who has been declared elected.

(f) That there was an error in the vote counting programs or summation of ballot counts.

Section 20024 Illegal vote

An election shall not be set aside on account of illegal votes, unless it appears that a number of illegal votes has been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person.

Section 20089 Applicability

The provisions of this chapter, exclusive of Article 4 (commencing with Section 20110),

shall apply to the recount of votes cast on a ballot measure, insofar as they can be made applicable.

Section 12003 Payment of bribe

A person shall not directly or through any other person pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:

(a) Induce the voter to:

(1) Vote or refrain from voting at any election.

(2) Vote or refrain from voting at an election for any particular persons.

(3) Come to the polls at an election.

(4) Remain away from the polls at an election.

(b) Reward the voter for having:

(1) Voted.

(2) Refrained from voting.

(3) Voted for any particular person.

(4) Refrained from voting for any particular person.

(5) Come to the polls at an election.

(6) Remained away from the polls at an election.

Section 12004 - Offer or promise of employment

A person shall not directly or through another person give, offer, or promise any office, place, or employment, or promise to procure or endeavor to procure any office, place, or employment to or for any voter, or to or for any other person, in order to induce that voter at any election to:

(a) Vote.

(b) Refrain from voting.

(c) Vote for any particular person.

(d) Refrain from voting for any particular person.

Section 12005 - Gift or consideration to one to procure election or vote of another

A person shall not directly or through any other person make any gift, loan, promise,

offer, procurement, or agreement to, for, or with any person, in order to induce that person to procure or endeavor to procure the election of any person or the vote of any voter at any election.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 18 1973

I have this day filed Order

HEARING DENIED

In re: 1 Civ. *No.* 31783

Canales

vs.

City of Alviso

Respectfully,

G. E. BISHEL
Clerk

11921-877 9-73 3M OSP

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JESUS CANALES, EDUARDO C. RESENDEZ and ARTHUR M. BAROS, Plaintiffs, and Appellants, vs. CITY OF ALVISO, Defendant and Respondent, CITY OF SAN JOSE, Intervenor and Respondent.	1 Civil No. 31783 (Sup. Ct. No. 201596)

On this second appeall by contestants from a judgment confirming the January 9, 1968 election consolidating the City of Alviso and City of San Jose (hereafter respondents),

---

[1] On the prior appeal (Canales v. City of Alviso, 3 Cal.3d 118), the Supreme Court determined that there was substantial evidence to show that nine illegal votes were cast in favor of consolidation and no evidence to the contrary, and reversed the prior judgment (entered pursuant to Code Civ. Pro., §631.8) sustaining the validity of the election, with specific recommendations to the

the major contentions concern the sufficiency of the evidence to sustain the trial court's findings as to the number of legal and illegal votes cast and the presence or absence of unlawful offers of valuable consideration or bribes by respondents, or any improper conduct by the election board, that induced votes in favor of consolidation. Contestants urge that since the election was determined by illegal votes and the unlawful conduct of respondents and the election board prejudicially and unconstitutionally diluted their votes, the trial court should have set aside the election. We have concluded that the second judgment confirming the election should be affirmed.

---

trial court for determining the legality of each vote, and rulings on the questions of law for the retrial of the issues relating to the offers and election board misconduct. Following the reversal, the contestants on March 26, 1971, filed a third amended statement of election contest pursuant to Elections Code section 20050 and Code of Civil Procedure section 187, alleging the three grounds summarized above.

Preliminarily, we turn to contestants' contention that the fundamental nature of the rights at stake requires us to make an independent review of the evidence, a question specifically not reached by the Supreme Court in the prior appeal (Canales v. Alviso, supra, p. 129). Contestants predicate their argument on Otsuka v. Hite, 64 Cal.2d 596, which held that where First Amendment free speech rights are at issue, the reviewing court must make an independent examination of the whole record. Significantly, in both Otsuka and L.A. Teachers Union, supra, there was no conflict in the evidence as to the encroachment on the constitutional rights in issue. Here, the lengthy record before us contains conflicting evidence on every factual issue, compounded by the lapse of four years between the occurrence of the legally significant events in 1967 and the second trial in 1971.

Contestants have not cited any authorities that would permit us to undertake an

independent review of such a record, and to depart from the usual rule of appellate review. In addition, to hold election results in doubt for protracted periods of time would be destructive of the workings of government,[2] in the absence of other speedier avenues of review.

Accordingly, we will proceed to set forth the facts and discuss the contentions on appeal in the light of the substantial evidence rule. In view of the number of issues presented, we set forth the facts in the discussion of each issue.

We turn first to the contentions concerning the number of legal and illegal votes. At the conclusion of the second trial, the court found that: 1) of the 369 ballots cast, 189 were in favor of consolidation and 180 against; 2) of the 22 votes, 13 were

---

[2] For the reason, the time limits, on the procedures for election contests are stringent (Elec. Code, §§20021, 20051, 20080, 20083, 20086).

legal, as they were cast by persons qualified to vote at the election, and 9 illegal, as they were cast by persons who were not legal residents of Alviso on the day of the election and for 54 days prior thereto; 3) of the 9 illegal votes, 4 were cast against consolidation, 2 in favor, and there was insufficient evidence as to how the remaining 3 votes were cast. The court further found that, therefore, 187 legal votes were cast in favor of consolidation, and that even if the 3 unresolved illegal votes should be found to have been cast in favor of consolidation, there would still be no less than 184 legal votes cast in favor of consolidation and 176 legal votes cast against, a majority of 8.

On this appeal, there are issues as to 18 of the votes challenged below: all 13 of the votes found legal, and 5 of the votes found illegal.

Contestants first contend that the

evidence is insufficient to support the finding that 13 of the challenged votes were legal as the persons who cast them were residents of the election precinct 54 days before the January 9, 1968 election, as then required by article II, section 1 of the state Constitution.[3]

The statutes here applicable are Government Code section 244 and Elections Code sections 14282, 14283, 14284, 14285, 14288, 14289, former section 14290, and section 14291, each set forth in the footnote below;[4] the provisions of the two codes must be construed together (Estate of Weed, 120 Cal. 634).

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[3] The constitutional provision was subsequently held unconstitutional (Young v. Gnoss, 7 Cal. 3d 18) and repealed on November 7, 1972.

[4] Government Code section 244: "In determining the place of residence the following rules are to be observed:

"(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

Clearly, while the former constitutional provision and the statutes use the term "residence," what is meant is "domicile" (Estate of Phillips, 269 Cal.App.2d 656, 659-660; Perham v. City of Los Altos, 190 Cal.App.2d 808, 809; Huston v. Anderson, 145 Cal. 320, 328), the one location with which, for legal purposes, a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning, but which the law may also assign to him constructively (Whittell v. Franchise Tax Board, 231 Cal.App.2d 278, 284). We also observe the well established rule that a domicile once acquired

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"(b) There can only be one residence.

"(c) The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child, provided that when the parents are separated, the residence of the parent with whom an unmarried minor child maintains his place of abode is the residence of such unmarried minor child.

is not lost until a new one is acquired, and the acquisition of a new domicile requires an actual change of residence, accompanied by the intention to remain, either permanently or for an indefinite time, without any fixed

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"(e) The residence of the husband is the residence of the wife, provided that a married woman who is separated from her husband may establish her own residence.

"(f) The residence of an unmarried minor who has a parent living cannot be changed by his own act.

"(g) The residence can be changed only by the union of act and intent."

Elections Code section 14282: "The residence of a person is that place in which his habitation is fixed and to which, whenever he is absent, he has the intention of returning."

Elections Code section 14283: "A person does not gain or lose residence solely by reason of his presence at or absence from a place while employed in the service of the United States or of this State, nor while engaged in navigation, nor while a student of any institution of learning, nor while kept in an almshouse, asylum or prison. This section shall not be construed to prevent a student at an institution of learning from qualifying as an elector in the locality

or certain purpose to return to the former place of abode (DeYoung v. DeYoung, 27 Cal.2d 521, 524; Estate of Glassford, 114 Cal.App.2d 181, 186).

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where he resides while attending that institution, when in fact the student has abandoned his former residence."

Elections Code section 14284: "A person who leaves his home to go into another state or precinct in this State for temporary purposes merely, with the intention of returning, does not lose his residence."

Elections Code section 14285: "A person does not gain a residence in any precinct into which he comes for temporary purposes merely, without the intention of making that precinct his home."

Elections Code section 14288: "The place where a man's family resides is his residence unless it is a place for temporary establishment for his family or for transient objects. Residence in a trailer or vehicle or at any public camp or camping ground may constitute a residence for voting purposes if the the registrant complies with the other requirements of this article."

Elections Code section 14289: "If a man has a family fixed in one place, and he does business in another, the former is his place of residence; but any man having a family, who has taken up his abode with the intention of remaining and whose family does not so reside with him, is a resident where he has so taken up his abode."

Thus, a domicile can be changed only by the union of act and intent (Rhodes v. Rhodes, 80 Cal.App.2d 723). A mere declaration of future intention to acquire a new residence does not affect the domicile until the intention is carried into effect by the completed act (Sheehan v. Scott, 145 Cal. 684) and the mere floating intention to return at some future period to a former place of abode is not enough to overcome residence in fact (Bullis v. Staniford, 178 Cal. 40; Estate of Weed, supra). The question of which of two residences is a person's legal domicile is mainly a question of

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Elections Code, former section 14290: "The residence of the husband is the residence of the wife except as provided in Section 14289."

Elections Code section 14291: "The mere intention to acquire a new residence, without the fact of removal avails nothing, neither does the fact of removal without the intention."

intent (Brown v. Happy Valley Fruit Growers, 206 Cal. 515). In determining the fact of such intention, the acts and declarations of the party must be taken into consideration (Guardianship of Mosier, 246 Cal.App.2d 164, 172; Whitlow v. Durst, 20 Cal.2d 523, 524). Among the significant acts so considered are the act of registering to vote (Perham v. City of Los Altos, 190 Cal.App. 2d 808, 809). Thus, Elections Code section 382 provides: "The registration of a voter is permanent for all purposes during his life, unless and until the affidavit of registration is canceled by the county clerk for any of the causes specified in this article."

Finally, we note that "'the question of residence or domicile is a mixed question of law and fact, and the determination of the trial court, upon conflicting evidence, is conclusive upon this court. [Citations.]'

(Estate of Peters, 124 Cal.App. 75, 77 [12 P.2d 118]; Bradley v. Davis, 156 Cal. 267 [104 P. 302].)" (Estate of Phillips, 269 Cal.App.2d 656, 659-660.)

As indicated above, as to the 13 voters found to be legal, the contestants first argue that the evidence does not support the findings that the following four persons were domiciled in Alviso at the pertinent time:

Mrs. Virginia Veiga: After the death of her husband, Mrs. Veiga moved from the ranch in San Jose that had been her home for 40 years, to the home of her daughter and son-in-law in Alviso and remained there from 1960 to 1964. From 1964 to 1967, she was able to find a companion and returned to the ranch to live. After the companion left in 1967, Mrs. Veiga returned to the home of her daughter and son-in-law in Alviso and lived there, as before, sharing the bedroom with her

grandsons and doing the cooking. She had registered to vote as a resident of Alviso by executing an affidavit of registration on October 24, 1961. At the time here pertinent, Mrs. Veiga ate and slept in Alviso, kept half of her clothes there, but returned to the ranch every day to feed her dogs and cats. Her subsequent move to the ranch in 1968, when she again found a companion, does not change the fact that there was sufficient substantial evidence to support the trial court's finding that 54 days before the election, her physical presence in Alviso, coupled with her intent, established Alviso rather than the San Jose ranch as her domicile at that time.

Frank J. O'Neill: Mr. O'Neill, who was not married, physically lived in Alviso on one of his 52 parcels of property 54 days before the election and cooked and ate his meals there. He registered to vote by executing an affidavit of regis-

tration on October 23, 1967, after cancelling a prior affidavit of registration executed in San Francisco. At the time of the second trial, Mr. O'Neill was still registered to vote in Alviso and lived in a trailer there. Although there was some evidence indicating that Mr. O'Neill returned every evening to his former home in San Francisco and established his domicile in Alviso in order to vote in the consolidation election, there is substantial evidence to support the trial court's finding.

James T. Cernusco:[5] Although Mr. Cernusco had owned a home in Livermore since 1948 with his wife, from whom he was not separated, he spent only one-fourth of his time there. He lived most of the time on his own away from his wife in Alviso where his main business interest was. He

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[5] As Mr. Cernusco died after the first trial, his testimony was read into the record.

physically lived in Alviso 54 days before the election and executed an affidavit of registration indicating that he was a legal resident of Alviso and that he considered Alviso to be his home. Elections Code section 14289 indicates that a person having a family who has taken up his abode with the intention of remaining and whose family does not reside with him is a resident where he takes up his abode. Johnson v. Johnson, 245 Cal.App.2d 40, cited by contestants, merely stated that if a person had only one home, his domicile could not be elsewhere. In that case, the question was one of domicile for divorce purposes where the husband, who was in the service, continually maintained a permanent address in California, even though he was subsequently transferred to Alabama and the Philippines. The court concluded that since he was a serviceman, only a clear and unambiguous intention to abandon his

California domicile and adopt a new one would be adequate to prove the change. Contrary to contestants' assertion, Johnson does not conflict with Huston v. Anderson, 145 Cal. 320, which specifically involved residence for purposes of voting and established that domicile once established cannot be lost until another is gained. The trial court properly concluded that at the relevant time, Mr. Cernusco was domiciled in Alviso.

Mary Collazo: In October 1967, Mrs. Collazo, with her husband, moved from Mountain View to State Street in Alviso in a home they rented from her brother-in-law. They had bought a lot in Alviso and were waiting to buy a home to move on their lot. Their furniture had also been moved to Alviso. After the election, they decided to return to Mountain View as they were unable to find a suitable home to place on their lot and

because her health required her to be near her doctor in Mountain View. Like the others, Mrs. Collazo had registered to vote in the election as a resident of Alviso and executed an affidavit of registration. Thus, as to Mrs. Collazo, there was substantial evidence to support the trial court's finding that she was legally domiciled in Alviso at the relevant time.

As to the remaining 9 of the 13 votes found legal, contestants maintain that the evidence does not support the trial court's finding of legal domicile in Alviso, as each of the following, although originally domiciled in Alviso, had changed domiciles more than 54 days before the election of January 9, 1968:

Donald and Frances Epperson: Donald Epperson testified that at the time of the election, he was living at and had his home at 1370 Taylor Street in Alviso where his

father owned a complex of dwellings that were occupied by various family members. Like his brothers, Donald worked in his father's business, was there practically every day, and frequently stayed in Alviso with his wife and 2 pre-school children. Donald had lived most of his life in Alviso, considered it his home and had registered to vote there in 1966. Frances also considered the Alviso address their home as they spent the majority of their time there. At most, the evidence concerning the home that Donald and Frances also owned and simultaneously occupied in Monte Vista, presented a conflict in the evidence; accordingly, there was substantial evidence to support the trial court's finding that Donald and Frances Epperson were domiciled in Alviso at the relevant time.

Jose and Eva Lopez: The record indicates that prior to moving to San Jose on October 30, 1967, Mr. and Mrs. Lopez had lived

in Alviso with her father. Their move to a rented furnished home in San Jose was a temporary one as they planned to return to Alviso in August. Although Mr. Lopez indicated he ultimately planned to move to Idaho, he had not yet acquired a residence there, or given up his Alviso residence. The move to a rented home in San Jose for a temporary purpose with a definite intent to return to Alviso indicates that no new domicile was acquired, and the old domicile was retained until a new one was acquired. The domicile of the wife follows that of the husband (Gov. Code, §244, subds. (c) and (e); Huston v. Anderson, 145 Cal. 320, 328). Mr. and Mrs. Lopez registered to vote in Alviso on October 20, 1967. Thus, substantial evidence supports the trial court's finding that Mr. and Mrs. Lopez were still domiciled in Alviso at the relevant time.

Betty Menear: As to Mrs. Menear, the uncontroverted evidence indicated that she

lived at 1228 Taylor Street in Alviso at the time she registered to vote in the early 1960's. Even though she and her husband had moved to San Jose in 1966, the move was a temporary one, and they always intended to return to Alviso. Mrs. Menear considered Alviso her home and the only place she had ever registered. After the move to San Jose, Mrs. Menear used the Alviso address on her driver's license and received some mail there. In February 1968, Mrs. Menear and her husband returned to Alviso and remained there until the time of the second trial. Given these facts, the trial court could conclude that Mrs. Menear never lost her domicile in Alviso even though they had no home in Alviso from 1966 to February 1968.

Emmitt E. Givens: Mr. Givens lived in Alviso from 1960 until he was married in September 1966, when he moved to his wife's apartment in Santa Clara. However, he kept

his home, furniture and clothes in Alviso where he also had his business and continued to use the Alviso address on his driver's license and car registration. In December 1966, he registered to vote in Alviso. Mr. Givens' move to his wife's apartment in Santa Clara was a temporary one as the apartment was too small and as they were looking for a larger place to live in Alviso. After the election, he permanently moved to another address in Santa Clara. Thus, there is sufficient evidence to support the trial court's finding that Givens was still domiciled in Alviso at the pertinent time.

Vernon Santos: Mr. Santos was raised in Alviso and returned there after he left the Army in 1962 and lived there until 1966. After his marriage in 1966, he moved to his wife's furnished apartment in San Jose but intended to return permanently to Alviso. In 1964, he had registered to vote from the State Street address in Alviso where he re-

sided three to four years and never registered to vote anywhere else. He continued to receive some mail in Alviso, left his furniture there, and planned to return after he found a place suitable for his family. Thus, there is sufficient evidence for the trial court's finding that Santos was legally domiciled in Alviso at the time of the election.

Belarmino Martinez: Mr. Martinez lived in Alviso until July 1967, when, unexpectedly, he moved to San Jose to the home of his parents, as he and his wife filed for divorce and he was unable to rent elsewhere. The home he and his wife occupied in Alviso was owned by his wife's parents. At the time he moved to San Jose, he intended to return to Alviso where he registered to vote in 1960. Under these circumstances, the court could find that Martinez did not acquire a new domicile by the temporary move to the home of his parents in San Jose after the initiation of

the divorce proceedings.

Hazel Jones: As to Hazel Jones, contestants assert that since her domicile followed that of her husband, she could not have been legally domiciled in Alviso at the time of the election. Her husband testified that in January 1964, after he left military service, he lived at 1600 Taylor Street and resided there until October 1, 1968. Between 1964 and 1968, he never lived at another residence than Taylor Street in Alviso until they moved away in 1968. During the time that they lived in Alviso, they used their business address, a bar in Palo Alto, on their drivers' licenses and other documents. Thus, there is ample substantial evidence to support the trial court's finding that Mrs. Jones was legally domiciled in Alviso 54 days before the January 9, 1968 election.

Thus, we conclude that there was sufficient evidence to support the trial court's findings that each of the above named 13

individuals cast a legal vote in the January 9, 1968 election.

We turn next to the argument that there is insufficient evidence to support the trial court's finding concerning the 2 votes against consolidation (Aurora Perez Trevino and Betty Canha). After the trial court found that both cast illegal votes, the court further found that each had cast her vote against consolidation. Mrs. Trevino testified that she voted for Alviso to remain separate and also told contestants' investigator, Mr. Cornick, that she had voted against consolidation. Although there was also some contrary evidence that she could not remember how she had voted, there was substantial evidence to support the trial court's finding that she voted No.

As to Mrs. Canha, there was also conflicting evidence. Although she had signed the petition for consolidation, she testified unequivocally that she had voted against consolidation. Contestants argue that her

testimony is inherently incredible in view of her close association with a number of proponents of consolidation. However, it is well settled that the credibility of a witness is exclusively within the jurisdiction of the trial court. Thus, there is substantial evidence to support the finding that Mrs. Canha voted against consolidation.

Next, we turn to the contention that the trial court erred in finding that there was insufficient evidence to resolve the illegal votes cast by Larry Canha, Jack L. Epperson and Manuel Juarez.[6] Contestants

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[6] As, pursuant to then applicable former article II, section 5 of the state Constitution and the pertinent provisions of the Evidence-Elections Codes, only an illegal voter can be asked how he voted, the retrial presented procedural problems of proof, as recognized by the prior opinion, Canales v. Alviso, 3 Cal.3d 118 at page 128, footnote 4. Pursuant to the procedure adopted by the parties, which had been suggested by the Supreme Court, the trial court postponed its determination of the legality of each challenged vote, and only a few of the voters found to be illegal were recalled to testify as to how they voted. These three voters were never asked as to how they had voted in the 1968 election.

urge that the record indicates that all three voted in favor of consolidation.

Larry (the son of Betty and Louis) indicated that although he had signed the petition for consolidation on the same day that he registered to vote, he kept an open mind as to the issues on the consolidation election. He could not remember if he read the petition for consolidation and was not at all times in favor of consolidation. In view of this sparse and conflicting evidence, the trial court properly concluded that there was insufficient evidence to resolve the question of whether Larry Canha voted for or against consolidation.

Jack L. Epperson also did not remember signing the petition for consolidation, although his signature appeared on it. Epperson, however, had two points of view on the consolidation issue. At the time of the prior trial, he had testified that he was in favor of it but he still had conflicting points of view.

Here, likewise, the trial court was faced with the conflicting evidence of the signature on the petition for consolidation under which the law of this case constitutes substantial evidence and the directly conflicting testimony of the voter that he had two points of view on the issue. Thus, the trial court properly concluded there was not sufficient evidence from which it could determine whether Epperson had voted for or against consolidation.

Manuel Juarez testified that at the time he signed the petition, he was for consolidation 2 1/2 months before the election but subsequently, by the time of the election, changed his mind as things had changed. At the second trial, Juarez had difficulty answering the question as to how he felt about the consolidation at the time of the election, but it was normal for any human being to change his mind. Juarez' testimony likewise was in such conflict that the trial court could only properly conclude that it could not determine

whether he had voted for or against consolidation.

We turn next to contestants' argument that the unlawful offers of valuable consideration and bribes by respondents, and the unlawful conduct of the election board, denied them equal protection and freedom of association. The trial court found that respondents made no offers of employment, rewards or other valuable consideration to procure a favorable vote for consolidation, or preclude any voter from expressing his views on consolidation, and that the precinct board was not guilty of malconduct.

The applicable principles were set forth in the Supreme Court's prior opinion. After holding that offers of consideration could be the grounds of a ballot measure election contest, the court continued at page 130: "A contestant must establish that the outcome of the election was determined by virtue of the defect of which he complains if the contest

is based upon illegal votes. (Elec. Code, §20024.) No such statutory requirement exists when a candidate election is contested on the basis of that candidate's offer of bribes to secure his election. Whatever should be the result when a candidate commits such acts, a ballot measure is not rendered unworthy of passage by the misdeeds of its proponents. Illegal offers of consideration should not void an election unless it is shown that the result would have been different without their influence--i.e., if they prevented the expression of the majority will."

As to the job offers and code enforcement, the court said at pages 131 and 132: "A countervailing limitation to the grounds upon which any election--candidate or issue--may be challenged is that fundamental First Amendment interests in full and free discussion may take precedence whenever they conflict with provisions of the Elections Code. Election-oriented debates are, of course, designed

to influence voting, and a campaign speech generally promising an increase in the number of government jobs arguably conflicts with provisions proscribing offering employment to influence voters. But First Amendment interests undoubtedly immunize election speeches which fall short of promises of employment conditioned on a certain vote. [Citation.]

"Viewed in this light, most of petitioners' objections to San Jose's promises must be rejected. Petitioners do not contend that the participation of San Jose city officials in a consolidation campaign in which that city is interested is per se improper, and city officials and other proponents must be able to argue the merits of consolidation. Accordingly, the fact that San Jose promised recreational and other municipal improvements, and 'great caution' in the enforcement of its building code, cannot affect the validity of the election, as purported advantages of consolidation such as these went to the heart of any meaningful debate

on this issue.

"Likewise, the fate of employees of a consolidated city is certainly of interest to those employees, and the fact that the consolidating city's officials took steps to minimize losses of employment, and to communicate their view of the relevant considerations, does not affect the validity of the election--at least where, as in this case, it is not shown that job guarantees were conditioned upon the employee's favorable vote. Article XI, section 1106 of the San Jose City Charter provides that employees of consolidated cities shall 'be deemed to have their names upon eligible lists for respective types of positions held by them, and to be qualified for appointment to such respective positions.' The San Jose City Manager's letters, giving his personal assurance that the recipient employees of Alviso would in fact be hired if consolidation carried, went beyond the charter provision only to the extent of indicating, in essence, that all eligible

applicants would find openings. A competent estimate of the practical effect of the charter provision, in light of San Jose's employment situation, would clearly be of interest to Alviso employees, and there is no impropriety in furnishing that estimate to the interested persons.

"It would be shirking reality to deny that the San Jose City Manager, who clearly favored consolidation, hoped that ensuring employment for Alviso's city employees would further the chances of consolidation at the polls, or that this hope was at least one motivating factor behind his letters and appearances. Such offers might be deemed improper in a candidate election [citation], but the balance between First Amendment interest in full discussion and Fourteenth Amendment interests in equal voting rights demands a different result here. Whatever the appropriate result when, for example, a candidate promises to retain his predecessor's staff if elected, the fate of

employees of a consolidated city is too close to the merits of the issue before the electors to permit chilling relevant discussion by voiding elections because of that discussion--especially when the purity of the promisor's motives is at most indirectly relevant to the merits of the measure voted upon. Moreover, petitioners presented no evidence that any of the six or eight employees who received the city manager's letters--or anyone else--was influenced thereby, and this ground of contest must therefore fail for lack of a showing that job offers affected the result of the election.

"The promises of jobs to volunteer firemen was apparently a matter of some controversy within the San Jose City Council, but a majority of that body determined in good faith that the charter provision should be applicable to unpaid firemen who are interested in paying positions upon consolidation. On the other hand, conditioning eligibility upon not being outspoken

in opposition to consolidation is clearly improper. [Citation.] Petitioners made no showing however, that any of the volunteer firemen who heard this condition were thereby deterred from opposing consolidation, or that this impropriety contributed in any way to the result of the election."

The record clearly indicated that contestants have not met their burden of showing that the job offers and code enforcement were conditioned on a vote for consolidation or on no opposition to consolidation, either in word or deed, and were determinative of the result of the election. The record clearly indicates that contestants have not met their burden of proof.

The only authorizing evidence concerning future employment of Alviso employees is found in San Jose's Resolution 31507. The resolution provides no authority to provide job offers to anyone to obtain favorable votes for consolidation or only others who voted for or did not oppose

consolidation.

Mr. Perkins, the Fire Chief of Alviso, indicated he was told that the City of San Jose would provide jobs for Alviso's volunteer firemen if they qualified, regardless of whether any of them were for or against consolidation. No employee of the City of San Jose ever told Perkins he had to vote a certain way in order to be placed on the eligibility list for the City of San Jose firemen. Mr. Hamann, the City Manager of San Jose, also indicated he never offered to any voter, directly or indirectly any kind of consideration to vote a particular way in the consolidation election. After the election, jobs were offered to those who had opposed consolidation, as well as to those in favor of it.

In fact, Perkins who was among the people who had opposed consolidation, was offered a job in the San Jose Fire Department[.] Three of the 9 Alviso volunteer firemen were offered jobs by the City of San Jose. The offers

were not firm and total commitments but simply an opportunity to be placed on the San Jose eligibility list if the person passed the required physical examination and then completed a one-year period of probation. Hamann's only authority from the city was to explain Resolution 31507 and the contract between the two cities and he was not authorized to make any statements contrary to these documents.

As to the enforcement of San Jose's dangerous building ordinance in Alviso, sections 5 and 17 of the resolution of intention and the contract between the cities relate to these matters and likewise contains no indication that these paragraphs were drafted for the purpose of procuring favorable votes for consolidation.

The statements about code enforcement were also with reference to the resolution and the contract, and were simply general indications that San Jose would be discretionary in

the strict enforcement of its building code and that no homes in Alviso would be torn down without giving the owners sufficient time to comply with the code. The resolution specifically urged the city manager and other agents and officers of San Jose to use great caution in the exercise of their enforcement power and to refrain from an action that would cause unnecessary hardships. There was nothing to indicate that the housing and building regulations of San Jose would be applied in Alviso any differently from the manner in which they were applied in San Jose, or that the regulations would not be applied uniformly or contrary to law.

Section 17 of the resolution recites that: 1) many houses in Alviso did not conform to the requirements for new buildings in San Jose; 2) existing buildings and structures are not illegal merely because codes are subsequently amended to impose more stringent requirements; and 3) appropriate action is in order only where

existing buildings become a nuisance, damage to health, safety or welfare. The resolution also indicates as a fact that hasty action with reference to the building codes could create adverse effects to the public welfare in Alviso where many of the homes had been placed on lots by their owners.

In response that statements of all of the homes in Alviso would be torn down on consolidation, Mr. Hoenes (the Administrative Aide to the San Jose City Manager), indicated that it would be the policy of San Jose on consolidation to assist the residents of Alviso to improve their homes and make them more liveable and there was no set time, except a reasonable time allowed to improve the homes and bring the houses to the requirements. The citizens of Alviso were advised they would have a reasonable time to bring their homes up to code and that San Jose would not arbitrarily apply its more stringent code for new building retroactively to the existing buildings.

The record provides no specific evidence as to how many homes in Alviso did not meet the requirements of the San Jose dangerous building ordinance, which was never introduced into evidence. Although there were some guesses that many of the homes in Alviso were nuisances, there was also evidence that many homes moved into Alviso by their owners were good homes that had been moved pursuant to a permit issued pursuant to the Uniform Building Code. Prior to being moved to Alviso, each house was inspected and passed on by Alviso operating under the Uniform Building Code and presumably met the requirements of that code.

The record before us is devoid of any evidence that any voter was disuaded from oposing consolidation or expressing his views or that any voter refrained from voting because of the statements made by any official, employee or agent of San Jose about future employment or code enforcement. It follows, therefore, that there is no evidence to establish that

any of the statements concerning future employment of Alviso employees by San Jose or lack of enforcement of the building codes influenced or determined the election results.

Contestants further maintain that a number of Alviso volunteer firemen were offered jobs in violation of the San Jose Civil Service regulations. However, the record indicates that explanations were generally made at public meetings to explain to the citizens what the San Jose charter provision concerning employment of consolidated cities was. The authorities cited by contestants are neither helpful nor permanent. The contestants simply failed to meet their burden of proof that the election was determined by any action on the part of the City of San Jose with respect to the job offers and code enforcement. Nor was there any indication that contestants were deprived of equal protection or freedom of association.

Finally, we turn to the contention that the elections board acted improperly in accept-

ing the votes of Betty and Louis Canha and Fred and Betty Menear. The prior opinion indicated, at page 129, that it would clearly be improper for election officials to permit the challenged voters to vote without administering the oath of residence required whenever a voter was challenged on the basis of nonresidence (Elec. Code, §14244.5).

Mrs. Sutcliff, the election board inspector who had served five or six years as an election official in other elections and had experience on election boards for 10-15 years, received an unsigned challenge list. The Menears told her they lived in Alviso and their names were so listed in the registry book. As to the Canhas, after they gave their address, Mrs. Sutcliff required an oath of residence from them. After a dispute about the oath, she called the registrar's office and was told they should be allowed to vote as long as their names were on the registry. The unsigned challenge list Mrs. Sutcliff

received showed Alviso addresses for each of the challenged voters, except one who apparently did not vote. No other evidence was presented to Mrs. Sutcliff that the votes in question should have been challenged and she understood that the law required additional evidence to show probable cause before she could challenge a voter. Mrs. Read, the election judge, was not certain whether the Menears were given an oath of residence. Mrs. Read was unfamiliar with the law at the time of the election as to what would be necessary to be presented to an inspector before an oath was required. Thus, it was the duty of the inspector Mrs. Sutcliff, to handle the challenged votes presented. Elections Code section 14240 indicates that before anything is done with reference to challenged voters, the election board shall first determine whether the document or list is accompanied by evidence constituting probable cause to justify or substantiate a challenge. This determination

was made here and the board concluded there was no evidence to constitute probable cause. Elections Code section 14255 provides that any doubt in the interpretation of the law should be resolved in favor of the challenged voter. The burden of proof is on the contestants (People ex rel. Orman v. Riley, 15 Cal. 48). More importantly, however, even assuming that the actions of the election board were improper, contestants have not shown that any of its actions had an effect on the outcome of the election. The trial court found that both Louis and Betty Canha had cast illegal votes and that Betty Canha had voted against consolidation. Louis' vote was deducted from the votes in favor and Betty's from the votes against. As to Betty Menear, the court found that she was a legal voter and as to her husband, Fred, no evidence was introduced concerning his status and no determination made thereon.

Thus, contestants have not established a

reasonable likelihood that their voting rights had been prejudicially diluted. Even assuming that such a showing had been properly made, no authorities are cited indicating that an election can be set aside on such a showing. People v. Garcia, 67 Cal.2d 830 and Maine v. Superior Court, 68 Cal.2d 375, simply concern the right to a fair trial in a criminal case in which a defendant is accused of a felony. The questions relating to election results are substantially different as everything must be resolved in favor of upholding an election. Here, contestants have not met their burden of proof as to dilution and even if they had, it is questionable whether, in order to vindicate their rights, it would be proper to prejudicially deprive the majority of those who voted for consolidation of the free exercise of that right.

We conclude that sufficient substantial evidence supports the trial court's conclusion that contestants have not met their burden of proving that consolidation carried only because

of the illegal votes and the illegal practices of respondents and the election board.

The judgment appealed from is affirmed.

Taylor, P.J.

WE CONCUR:

Kane, J.

Rouse, J.

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Williams v. Rhodes, 393 U.S. 23 (1968) 7

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1109

JESUS CANALES, et al., *Petitioners,*

vs.

CITY OF ALVISO, et al., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Court of Appeal of the State of California, First Appellate District, Division Two

INTRODUCTION

In reviewing the Petition For a Writ of Certiorari in the instant case, one is reminded of the story of the Phoenix. This case began with an election contest filed almost six (6) years ago. Since that time, the case has been heard twice by the California Superior Courts, twice by the California Appellate Courts, and once by the California Supreme Court. The California Supreme Court refused to hear the matter again, and one might have thought at this point, that the lengthy

matter had finally been resolved. However, now petitioners request a review of the State Appellate Court's decision, alleging infringement of rights protected by the United States Constitution.

Their position seems to be reducible to the proposition that whenever in an issue election setting, the existence of illegal offers of consideration (ostensibly in this case the purported offers of jobs to firemen and purported promises of a five-year moratorium on building code enforcement to Alviso residents) is established, or whenever illegal votes equal to the margin of victory are established, the election, because of constitutional requirements must, "ipso facto," be set aside. They insist that a requirement to show causation between the offers made or the illegal votes cast and the result of the election will in some mysterious way cause a violation of the equal protection provisions of the Fourteenth Amendment to the United States Constitution.

We contend that such a proposition cannot even exist in the context of this case unless this Court concludes that an independent review of the record is required by the Federal Constitution. This is so because the finding of the trial court was that no such illegal offers had ever been made, and that a sufficient number of illegal votes had in fact been cast against the election result, and thus the illegal votes cast for the winning side did not equal the margin of victory.

We maintain that independent review has no place in the case at hand. Additionally, we maintain the

proposition advanced by petitioners finds no support in the law and is in fact violative of public policy.

ARGUMENT

PART I:

THE CONCEPT OF INDEPENDENT REVIEW IS NOT APPLICABLE TO THIS CASE

Petitioners assert that we are dealing with a fundamental freedom, the right to vote; that dilution of voting rights here exist; and that, therefore, this Court must make an independent review of the record. Such an independent review of the record by this Court is critical to petitioners' position, since the trial court found that no illegal offers were made and that a majority of legal votes were cast for consolidation.

None of the cases, *Norris v. Alabama*, 294 U.S. 587 (1935); *Haynes v. Washington*, 373 U.S. 503 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Jacobellis v. Ohio*, 378 U.S. 184 (1964), cited by petitioners to establish the proposition that this Court must make an independent review of the record is relevant to our case. *Norris*, supra, involved quashing an indictment for rape against a Negro defendant, on the basis that the State practice in Alabama to exclude Negroes from the Grand Jury was violative of the equal protection clause of the Fourteenth Amendment. *Haynes*, supra, involved setting aside a crimi-

nal conviction for robbery on the grounds of an involuntary confession where the evidence establishing same was undisputed. *Edwards,* supra, involved freedom of speech, a conviction of Negroes in a southern state for a breach of the peace where the uncontradicted evidence in the record showed a peaceable assemblage, without any violence or the threat thereof. *Jacobellis,* supra, involved a conviction of a motion picture theatre manager, under an Ohio obscenity statute, for processing and exhibiting a movie called "The Lovers", and thus also involved freedom of speech.

None of the authorities cited, all of which are criminal cases, in which independent review of the record has been applied is even remotely analogous to our case on its facts, and none of the cases involved dilution of voting rights, or even the subject of voting. We submit that the doctrine of independent review has no place in the instant case.

To involve this Court in an independent review of the record "de novo", without any compelling legal precedent in an election contest where no evidence of fraud or intentional misconduct exists would, in effect, be disruptive of the democratic process. Certainty in elections is necessary for proper functioning of the democratic process. To hold election results in doubt for protracted periods of time would be destructive of the working of government. This is why the election contest procedures themselves, which are the statutory vehicle for resolving disputes over elections, require a much speedier disposition of the issues

than other types of cases.[1] That is why the policy of the law is to uphold elections. *Simpson v. City of Los Angeles,* 40 Cal.2d 271 (1953); *Davis v. County of Los Angeles,* 12 Cal.2d 412 (1938); *Ridcout v. City of Los Angeles,* 185 Cal. 426 (1921); *People v. Prewett,* 124 Cal. 7 (1899).

The trial court has found that sufficient legal votes were cast to carry the election, and no illegal actions occurred which determined the outcome of the election. If a trial court performs its function in our judicial system and on the basis of substantial evidence finds facts which uphold the election, the result should not be disturbed in the absence of clear errors of law. To operate otherwise would be to involve the appellate judiciary in the improper role of fact finder without having had an opportunity to observe the demeanor of the witnesses and to invite election contests. If the independent review principle is to be applied

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[1]The petitioners must file the statement of contest: (a) in cases other than a tie, where the contest is brought on any of the grounds mentioned in §20021(e) of the California Elections Code, not later than six (6) months; (b) in cases of ties, not later than twenty (20) days; and (c) in all other cases not later than thirty (30) days after the declaration of result of the election by the body canvassing the returns. Cal. Elections Code §20051.

The judge must, after notification by the County Clerk of the filing of the statement of contest, forthwith designate the time and place of hearing which shall be not less than ten (10) nor more than twenty (20) days from the date of the Order. Cal. Elections Code §20080.

The court may not adjourn the trial for more than twenty (20) days. Cal. Elections Code §20083.

The court must file its findings of fact and conclusions of law within ten (10) days after submission of proof and allegations and must immediately thereafter pronounce judgment and the judgment must be entered immediately thereafter. Cal. Elections Code §20086.

to election contests in the manner suggested by petitioners, it would be much better to give exclusive jurisdiction over election contests to the United States Supreme Court. This would avoid all of the time consumed in the trial and intermediate appellate process, would assure speedy determination of election disputes and avoid uncertainty and delay in the running of government.

PART II:

ESTABLISHMENT OF ILLEGAL OFFERS IN AN ISSUE ELECTION CONTEST ARE NOT AUTOMATIC GROUNDS FOR OVERTURNING AN ELECTION.

Petitioners contend that the City of San Jose offered jobs to firemen illegally, and illegally promised to allow a grace period within which Alviso residents could bring their homes up to building code standards. They further argue that once any such "*illegal*" offers are established in an issue election, such election must be set aside on equal protection grounds, without the further showing that such offers had a determinative effect on the election results. The record in this case is absolutely clear that no illegal offers of consideration were made. The trial court so found, which finding was upheld, in toto, by the State Court of Appeal after an exhaustive analysis of the record.

It is incredible to assert that exercising reason in code enforcement and explaining the City's position with reference to future employment plans for employees of Alviso, in the context of an election, when false stories were being circulated about what consol-

idation would bring, could violate equal protection of the laws. Certainly none of the cases cited by the petitioners even remotely support any such principle. *Wesberry v. Saunders,* 376 U.S. 1 (1964), struck down a Georgia congressional districting statute as violative of the people's right to choose congressmen, under Article 1, Section 2 of the Federal Constitution, where the uncontested evidence was that the statute's application resulted in unequal congressional representation on the basis of population. *Williams v. Rhodes,* 393 U.S. 23 (1968), held that an Ohio election law requiring a new political party seeking ballot position in a presidential election to obtain petitions signed by qualified electors totaling fifteen percent (15%) of the number of ballots cast in the last gubernatorial election, while the Democratic and Republican parties could retain their ballot positions by polling ten percent (10%) of the votes in the last gubernatorial election and did not need to obtain signature petitions, violated the equal protection clause of the Fourteenth Amendment, since it burdened the right of individuals to associate for the advancement of political beliefs and the right to cast their votes effectively and since the State showed no compelling interest justifying such burdens. The case of *Shakman v. Democratic Organization,* 435 F.2d 267 (7th Cir. 1970), cert. den. (1972), 402 U.S. 909, indicated that a complaint alleging that the officers of the City of Chicago and Cook County requiring city and county employees as a condition of holding their jobs and drawing their salaries from the public treasury to fur-

nish votes, campaign work and money to elect candidates chosen by the regular democratic organization and that such practice makes more difficult and often prevents the election of other candidates stated a cause of action should not have been dismissed by the district court. It should be noted that the remedy prayed for was a declaration that the practices of the defendants violated constitutional rights of candidates, an injunction against such practices and damages. There was no prayer that any election be set aside, for indeed no election was at issue. *Lucas v. Forty-Fourth General Assembly,* 377 U.S. 713 (1964), held that the overall legislative representation in the two (2) houses of the Colorado legislature was not sufficiently grounded on population to be sustainable under the equal protection clause.

It should be observed that we are not here dealing with a denial of equal representation in the legislature, or a refusal to have one's name or party placed on the ballot, or with a condition that one must vote a certain way, contribute money or campaign to get or keep a job. We are dealing with the right of a city in an election to indicate what its position will be with respect to certain issues. Even assuming, arguendo, the worst about the statements made by San Jose and its adherents, in a contest between freedom of speech and the right to vote, freedom of speech is paramount as long as there were no conditions imposed by San Jose with respect to voting a certain way, or expressing opinions on the election, and especially if there is no showing that the statements

made by the respondents determined the election outcome.

It should also be observed that in every case, except *Shakman*, cited by petitioners to establish that equal protection of the laws was denied those opposed to consolidation, state or local regulations or statutes are involved. But no city ordinance or statute in any way impaired the voting rights of petitioners.

Secondly, the injury complained of in each case was clear and uncontested; i.e., being kept off the ballot or being deprived of equal representation, and in *Shakman,* the issue before the court on appeal was whether the plaintiff had stated a cause of action. For such purposes, the allegations of the complaint and thus the injury complained of on appeal, that of illegally requiring votes, contribution of money and campaign time as a condition to gaining or retaining a job were taken as true. Here the injury complained of, namely, dilution of voting rights, is the very issue. How have petitioners established that anything done by San Jose which petitioners are complaining about determined the result of the election and thus trod upon their voting right?

Thirdly, in no case cited by petitioners to establish denial to them of equal protection of the laws was there a clash between a legitimate exercise of freedom of speech and voting rights. This is the issue in this case. Are we to extend the law to so assiduously protect voting rights, that freedom of speech is substantially impaired. Unless there can be free exchange, free expression in elections, unless the elec-

torate can be informed on the positions of the parties' candidates, or in this case, the position of the City of San Jose, how can the voter be informed and vote intelligently? Even the voting cases say that literacy requirements if uniformly and reasonably applied, can be imposed as a condition for voting, since having an intelligent and well informed electorate on the issues is a legitimate state interest and concern. *Lassiter v. Northampton City Board of Elections,* 360 U.S. 45 (1959). The same legitimate state interest and concern, that of having an intelligent and well informed electorate, is served by telling the electorate where one stands on election issues.

Even assuming arguendo, however, that petitioners had been able to establish the existence of such illegal offers, it does not follow that the election should be set aside without a further showing that such offers had a pivotal impact on the election results. Such a showing must be required in conformity with the spirit of the Elections Code and the policy of upholding elections. Otherwise, a few isolated illegal actions could overturn an election which had carried by a healthy majority. Election contests would be the order of the day, and *no* election would be immune, since men are at the present stage of evolution, still human and not yet angels.

This would fly in the face of the policy of upholding elections, and chaos and uncertainty would be substituted in place of order and certainty. Such a rule would prejudicially deprive those who had cast their vote for the winning side of a fundamental liberty to

have their vote counted without dilution. *Reynolds v. Sims,* 377 U.S. 533 (1964).

Petitioners are unable to present this Court with any relevant authority to sustain their novel and unrealistic position that an issue election can be overturned by a mere showing of illegal offers, for no such authority exists.

The only authority cited by petitioners is *Mills v. Electric Auto Lite Co.,* 396 U.S. 375 (1970). This was a case in which the Supreme Court in construing a federal statute, whose purpose was to compel disclosure, determined that establishment of material misrepresentation in proxy statements in a proposed corporate merger was sufficient to establish a cause of action for violation of the Securities Exchange Act without a further showing that such misrepresentation had brought about the merger. The court did not, as petitioners have incorrectly stated, determine that such misrepresentation was sufficient grounds for setting aside the merger. The court merely found it to be sufficient grounds, under the Securities Exchange Act, to establish a cause of action for violation of the Act, remedies for the violation of which included recovery of damages, as well as setting aside the merger. The court explicitly declared that the trial court should determine the remedy, and that there need not be and in fact should not be dissolution of the merger unless the lower court concluded from all the circumstances that it would be equitable to do so. It is apparent that the *Mills* case deals with corporate elections, not public elections, and that the

competing policy to uphold public elections is not present. It is clear that the case concerns construction of a federal statute and not whether the statute was constitutional. The plaintiffs in the case never asserted the statute would have been unconstitutional had it required a showing that the misrepresentation had brought about the merger, but merely that the Act did not require such a showing. It is additionally clear that there was not present in the *Mills* case a clash between freedom of speech and voting rights. For the *Mills* case involved misrepresentation and failure to disclose. Yet in the instant case, petitioners are not asserting there was any misrepresentation or failure to disclose by San Jose of its intentions with respect to what would happen upon consolidation. Quite the opposite. They are complaining that what was said was illegal, not that it was false or misleading. But the State trial court determined that the so-called offers by San Jose were not illegal, but a legitimate exercise of freedom of speech.

PART III:

ILLEGAL VOTES MUST DETERMINE AN ELECTION RESULT BEFORE THEY CAN CONSTITUTE GROUNDS FOR OVERTURNING AN ELECTION.

In the case at hand, the trial court found, as indicated in the State Court of Appeal's decision which appears in an appendix submitted under separate cover by petitioners, that 189 votes had been cast for consolidation; that 180 votes had been cast in opposition to consolidation; that 9 illegal votes had been

cast; that of the 9 illegal votes, 4 had been cast against consolidation, 2 in favor of consolidation, and that it could not be ascertained from the evidence how the remaining 3 illegal ballots had been cast; that 360 legal votes had been cast at the election, a majority of which is 187; that 187 legal votes had been cast for consolidation; that even if all of the said remaining illegal voters should be found to have voted against consolidation, there would still be 184 legal votes cast in favor of consolidation.

Petitioners contend that the one-man one-vote rule of the Fourteenth Amendment requires that an election be set aside whenever the existence of illegal votes equal to the difference between the winning and losing side is established. It is true in the instant case that the trial court found the existence of 9 illegal votes, equal to the difference between the winning and losing side. But the same trial judge found from the evidence how 6 of the 9 illegal votes were cast. He deducted the 4 illegal votes he found cast against consolidation from the side opposed to consolidation, and deducted the 2 illegal votes he found cast for consolidation from the side favoring consolidation. There were only 3 illegal votes which the trial judge found himself unable to place either in the "for" or "against" column. Even assuming that these 3 votes were cast for consolidation and deducted from that side, the consolidation measure would still pass by a majority of legal votes. Thus, the illegal votes were purged from the election process and played no part in the election result. Petitioners might better argue

(although no cases support even this position) that the Constitution demands an election be set aside whenever illegal votes exist which equal the margin of victory, and the court is *unable* to determine from the evidence how they were cast. However, as above stated, this situation does not exist in our case.

Petitioners must argue that the Fourteenth Amendment of the United States Constitution allows the trial judge to sit in election contests as fact finder with reference to the existence of illegal votes, but deprives him of his right to sit as fact finder with reference to how such illegal votes had been cast. Under this theory, the trial judge would be foreclosed as a matter of law from *ever* determining how an illegal vote had been cast in an election contest, no matter how clear and uncontradicted the evidence was, no matter what the circumstances. This is preposterous, and of course, petitioners have cited no cases to support their principle. Petitioners attempt to justify such an absurd position by asserting that our legal system, which seems to be sufficient to determine facts in every other type of case, is somehow totally inadequate to establish how an illegal voter cast his vote in an election contest case. Petitioners had every chance to establish by the evidence that all or some of the illegal voters cast their votes for consolidation. They failed to do so, not because any weakness or inadequacies in our legal system exist, but because of their own weakness and inadequacies to produce sufficient evidence on the point. Petitioners first assume that all the illegal voters cast illegal votes for sinister reasons,

and that therefore would lie when asked how they voted. In the instant case, the trial court found that all the illegal votes were illegal because of misunderstanding and ignorance and that there was no fraudulent intent to improperly register or vote on the part of such voters. There is no reason to assume why all, or even any, of such voters if asked would lie as to how they cast their vote. But even if they did, skilled questioning by trial counsel and the evaluation of the responses by the trial judge should be appropriate to protect the interests of both sides and sufficient to arrive at the truth of the matter.

To accept petitioners' position would result in a rash of election contests. Petitioners argue that election contests are rare and even rarer where the number of illegal votes constitutes the difference between winning and losing. From this, they reason that to set aside this election will not mitigate against the policy of upholding elections and of preserving certainty in elections. Of course, election contests are rare because of the policy to uphold them if at all possible. Petitioners are not encouraged to file because of that very policy. Any relaxation of the policy, especially of the type here proposed, will certainly not dissuade prospective petitioners from filing, but stimulate them to file.

If this Court concludes that the Federal Constitution dictates the setting aside of elections whenever the number of illegal votes equals the difference between the winning and losing sides, it will be encouraging an ever increasing number of election contests.

CONCLUSION

Certiorari is not a matter of right, but discretion, and will be granted *only* where there are special and important reasons therefor. In exercising such discretion, this Court should consider that petitioners have been given not once, but twice, a full airing of every aspect of their case at all levels of the California court system. The California Supreme Court, a pacesetter in making new law, a court of some distinction and with a reputation of not shirking the resolution of constitutional issues, but rather of openly embracing novel constitutional questions and sensitive to the full protection of constitutional rights, has concluded a rehearing of the matter was not warranted.

To grant certiorari in the case at hand on the basis of the tenuous showing by petitioners of the supposed deprivation of their constitutional rights, in the context of an election contest where upholding election results if possible is a datum, where certainty and speedy resolution of disputes is a well-established policy grounded in sound logic, would be unthinkable.

Dated this 13th day of February, 1974, at San Jose, California.

Respectfully submitted,

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Attorney for Respondents.

Supreme Court, U. S.
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Brief of Alviso Ad Hoc Committee, Amicus Curiae, in Support of Petition for Certiorari

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Brief of Alviso Ad Hoc Committee, Amicus Curiae, in Support of Petition for Certiorari

INTEREST OF AMICUS CURIAE

The Alviso Ad Hoc Committee is a nonpartisan unincorporated association with membership consisting almost entirely of residents of and voters in the City of Alviso, California. It is engaged solely in defense of the basic legal rights and interests of

Alviso residents, qua residents, and especially those many City residents of Mexican ancestry. During its existence it has been particularly concerned with preserving fundamental democratic standards for the expression of popular will by Alviso residents in elections to determine whether the City of Alviso should consolidate with the City of San Jose.

Resultantly, the Alviso Ad Hoc Committee is no less concerned that certain requirements of California Elections Code Section 20024 are unconstitutional on their face and as applied insofar as they place a constitutionally impermissible and logically impossible burden on election contestants, Petitioners herein. Such requirements compel Petitioners to establish not only that illegal votes were cast in a number equal to or exceeding the differential between "yes" votes and "no" votes, but to prove that such votes actually determined the election.

The consent of the attorneys for petitioners has been orally obtained; the consent of the attorneys for respondents has been orally denied.

STATEMENT OF THE CASE

The *Petition for Writ of Certiorari* brings before this Court an appeal of an election contest arising from the last of three elections held between 1960 and 1968 in which the electors of the City of Alviso were to determine whether to consolidate the City of Alviso with the City of San Jose. Consolidation was twice defeated by Alviso voters. In the last election,

held on January 9, 1968, the consolidation measure passed by nine votes (189-180). The Court below found that nine votes were cast illegally. The precise circumstances of this election, and of this lawsuit, are set out in some detail in the *Petition for Writ of Certiorari*, pp. 2-9. The Alviso Ad Hoc Committee respectfully joins in requesting this Honorable Court to review the refusal of the Court below to set aside an election on the basis that contestants failed to meet the proof burden established by California Elections Code Section 20024.

QUESTION PRESENTED

Whether, in an election contest won by a number of votes equalled or exceeded by the number of illegal votes cast therein, the burden placed on contestants under California Elections Code Section 20024, to prove that illegal votes actually determined the election, violates the Fourteenth Amendment where the Court did not purge the polls but rather based its finding that contestants failed to meet their proof burden on mere circumstantial evidence, which evidence was incorrectly reviewed by appellate courts under the substantial evidence rule.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Courts below decided an important question of Constitutional law which has not been, but should be settled by this Court, namely whether, in an election contest

won by a number of votes equalled or exceeded by the number of illegal votes cast therein, the burden placed on contestants under California Elections Code Section 20024, to prove that illegal votes actually determined the election, violates the Fourteenth Amendment where the Court did not purge the polls but rather based its finding that contestants failed to meet their proof burden on mere circumstantial evidence, which evidence was incorrectly reviewed by appellate courts under the substantial evidence rule. Judicial solutions to this question to date have been quixotic and incompatible with the high position and integrity afforded the electoral process by the Fourteenth Amendment. *Reynolds v. Simms*, 377 U.S. 533, 12 L. Ed. 523 (1964).

Where an election is won 189-180, a Court finding of nine illegal but undetermined votes should be sufficient to void the election as a matter of law.

This issue has never been directly faced by the United States Supreme Court. In 1890, the California Supreme Court laid the seeds of the present Constitutional controversy in *Russell v. McDowell*, 83 Cal. 70, 23 P. 183, which directed that the undetermined illegal votes were to be prorated among the parties where there is no evidence of how those votes were cast. *Singletary v. Kelly*, 242 C.A. 2d 611, 51 Cal. Rptr. 682 (1966) followed *Russell v. McDowell, supra*, without discussion. Both cases were approved in *Canales v. City of Alviso*, 3 C. 3d 118 at 127, 89 Cal. Rptr. 601 at 607, 474 P. 2d 417 at 422 (1970).

The *Russell* case, *supra*, was grounded on the fundamentally unworkable presumption that courts can and should determine how illegal voters voted. Said case proposes that this be accomplished either by attempting to correlate the illegal voters with their illegal ballots, or by introduction of extrinsic evidence with the burden of proof on contestants. Interestingly, ballot inspection in *Russell, supra*, failed even to establish by whom the illegal votes were cast. Because no extrinsic evidence was introduced, proration resulted. *Russell, supra*, 83 Cal. at 72-73.

Six years after *Russell, supra*, the secret ballot was established in the California Constitution, Cal. Const., Art. II, para. 5 (1896), thereby precluding judicial attempts to match and identify voters and their votes by physical identification. Thus the only *Russell* alternative to survive the secret ballot was to determine the directives of ballots in question by extrinsic evidence. Such a solution leaves unanswered the question of how such illegal votes were actually cast. Absent an accurately and objectively verifiable answer to this question there is no feasible solution tolerable under the Fourteenth Amendment other than to void the election as a matter of law.

This conclusion is constitutionally unavoidable in that the only alternative results in the highly uncertain and questionable proposition that an accurate reconstruction of electoral data is possible without the inescapable dilution of votes legally cast by those cast illegally. In the rare instances in which

elections are decided by a number of votes which differential is equalled or exceeded by votes illegally cast under suspect circumstances, the only constitutional course consistent with *Reynolds v. Simms*, *supra*, 377 U.S. at 555 is to direct a new election. This is especially so in light of the above mentioned secret ballot provision of the California Constitution which precludes the only true and accurate means of determining which side of the scale the weight of the illegal votes should fall.

The fundamental unfairness to all electors by not voiding such an election was articulated in Paine, *A Treatise On the Law of Elections to Public Offices* (1890) which states:

> "Where the illegal votes have been cast, the true rule is to purge the poll, by first proving for whom they were cast, and thus ascertaining the real vote; but if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportions the fraud among the parties." p. 433 n. 3.

A purge of the polls, that is, matching the vote with the person who cast it, is now legally precluded by unnumbered, unidentifiable secret ballots and by widespread use of voting machines.

The California Court of Appeal did not establish an appropriate judicial standard for treatment of illegal votes where such votes outnumbered the election differential. The Court stated that "Everything must be resolved in favor of upholding an election." *Canales et. al. v. City of Alviso*, 1 Civil, No.

31783, First App. Dist., Div. Two, filed August 21, 1973, p. 32, cert. den., October 18, 1973. It is submitted that the validity and integrity of the electoral process and the election result should be the appropriate standard. This cannot be done if the courts place an extremely onerous, if not impossible, burden on election contestants who have amply demonstrated there were as many or more illegal votes than separated the prevailing from the losing mandate.

Moreover, the position of the Court below is based on the review of the trial Court's decision under the substantial evidence rule. This position relies on the proposition that the right to vote is not a fundamental right under the U. S. Constitution and thus does not require an independent review by the appellate court(s). *Amicus* submits that this Court should review and decide this issue, and that this question, alone, provides sufficient cause to grant *certiorari*. The right of suffrage in state as well as federal elections is "established and guaranteed by the Constitution." *Lassiter v. Northampton City Board of Elections*, 360 U.S. 45, 51 (1958). With consistency and emphasis, this Court articulated this proposition in *Reynolds v. Simms*, *supra*, stating that:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting free exercise of a franchise." *Reynolds v. Simms*, *supra*, 377 U.S. at 555.

Indeed the California Supreme Court, in *Otsuka v. Hite*, 64 Cal. 2d 596 (1966), recognized the franchise as a fundamental constitutional liberty which flows "from the wellsprings of our National heritage." *Otsuka v. Hite*, 64 Cal. 2d at 602. Further, such right is entitled to the same constitutional status as First Amendment rights. *Otsuka v. Hite*, 64 Cal. 2d at 601.

In matters of fundamental liberty, reviewing courts are not bound by trial Court findings but must make an "independent review" of the record. *E. g., Jacobelis v. Ohio*, 378 U.S. 184 (1964); *Haynes v. Washington*, 373 U.S. 503 (1963); *Napue v. Illinois*, 360 U.S. 264, 261 (1959); *Watts v. Indiana*, 338 U.S. 49 (1949); *Hoover and Allison Co. v. Evatt*, 324 U.S. 652 (1945); *Norris v. Alabama*, 294 U.S. 587 (1935). This rule is compelled as the appropriate legal standard when the court finds that the number of illegal votes equals the number of votes by which the election carried.

The cherished process by which citizens determine elections is a peculiar anomaly in the range of constitutional rights. It is predicated on assuring a uniquely objective and verifiable result. Neither circumstantial evidence nor the substantial evidence rule can adequately protect the fundamental rights of the franchise when applied to determine how illegal voters cast their ballot. The Constitution requires the counting of "yes" votes and "no" votes. The counting of "maybe" votes and "circumstantial" votes is an unwarranted and impermissible intrusion into the ballot box.

If the decision *sub juris* is allowed to stand, it will mean that because of the physically impossible task of proving whether the "yes" or "no" votes embraced illegal votes, the electorate cannot effectively challenge a clearly improper election.

The Constitutional pitfalls inherent in failing to overturn the proposition that the franchise is not a fundamental right are nowhere more poignantly dramatized than in *Canales v. City of Alviso*, 1 Civil, No. 31783, First App. Dist., Div. Two, filed August 21, 1973, cert. den., October 18, 1973. In that decision, the Court of Appeal applied the substantial evidence rule to review both the number of illegal votes and how such votes were in fact cast. *Canales v. City of Alviso, supra*, Civil No. 31783, p. 3. Therein the patently unworkable nature of the substantial evidence rule to determine how illegal votes were cast was inadvertently underscored. The Court sustained the trial Court's finding that there was insufficient evidence to resolve the question as to how three critical illegal voters voted. *Canales v. City of Alviso, supra*, 1 Civil, No. 31783, pp. 18, 19, 20. Moreover, to rely on testimony of the very people who cast illegal votes as a basis to establish substantial evidence is fraught with built-in hazzards, adding insult to constitutional injury. The California Supreme Court recognized the force of this problem when it agreed with counsel in *Russell v. McDowell, supra*, 83 Cal. 70 at 73, when he said:

> "There is but one means of proving how the illegal voter has cast his vote; that is to say, by his own testimony, which is more likely to be false than true; and consequently the attempt

> to prove how illegal votes have been cast can only result in aggravation of the fraud."

The Court again demonstrated this problem in *Canales v. City of Alviso, supra*, 3 Cal. 3d 118 at 128, when it recognized both that a witness may change his mind after signing a petition or "that a strong proponent of consolidation who voted illegally would lie to preserve the result of the election." *Canales v. City of Alviso, supra*, 3 Cal. 3d at 128.

The California courts subjected the fundamental right of a fair and undiluted franchise to the abject uncertainty and unfairness of the substantial evidence rule to accurately determine how illegal votes were cast. No other conclusion is permitted by the Court of Appeal's illustrative treatment of one illegal voter:

> "As to Mrs. Canha, there was also conflicting evidence. Although she had signed the petition for consolidation, she testified unequivocally that she had voted against consolidation. Contestants argue that her testimony is inherently incredible in view of her close association with a number of proponents of consolidation. However, it is well settled that the credibility of a witness is exclusively within the jurisdiction of the trial court. Thus, there is substantial evidence to support the finding that Mrs. Canha voted against consolidation." *Canales v. City of Alviso, supra*, 1 Civil, No. 31783, pp. 24-25.

In an election where illegal votes equal the number by which the election carried, there is no more certain path to uncertainty and unfairness than to employ either the substantial evidence rule or circumstantial evidence to determine how illegal votes were cast and hence the election outcome.

CONCLUSION

Because the issues presented in this case are of paramount importance to the fundamental rights guaranteed by the Fourteenth Amendment and to vindication of the interests secured thereunder, *amicus curiae* respectfully request this Court to grant the *Petition for Writ of Certiorari.*

Respectfully submitted,

DELIZONNA, BOURHIS & BOURHIS,
By HARRY J. DELIZONNA &
RAY L. BOURHIS,
Attorneys for Amicus Curiae

In the

Supreme Court of the United States

October Term, 1973

No.....

JESUS CANALES, et al.,

Petitioners,

vs.

CITY OF ALVISO AND CITY OF SAN JOSE,

Respondents.

Brief of Alviso Ad Hoc Committee, Amicus Curiae, in Support of Petition for Certiorari

---

AFFIDAVIT OF SERVICE

HARRY J. DELIZONNA, being first duly sworn, under oath, deposes and says:

1. That on the 18th day of January, 1974, three copies of the Brief of Alviso Ad Hoc Committee, *Amicus Curiae*, in Support of Petition for Writ of Certiorari were mailed, postage prepaid, to:

CITY OF ALVISO
FABER L. JOHNSTON, ESQ.
First National Bank Building, No. 711
San Jose, California 95113

CITY OF SAN JOSE
PETER G. STONE, ESQ.
City Attorney's Office
151 West Mission Street
San Jose, California 95110

JESUS CANALES, et. al.
STEPHEN V. MANLEY, ESQ.
Community Legal Services
330 North Market Street
San Jose, California 95110

2. That all parties required to be served have been served.

Subscribed and sworn to before me this 18th day of January, 1974, at San Jose, California.

.....

HARRY J. DELIZONNA

Subscribed and sworn to before me this 18th day of January, 1974, at San Jose, California.

.....

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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1973

No. 73-1109

JESUS CANALES, et al.,

Petitioners,

vs.

CITY OF ALVISO AND CITY OF SAN JOSE,

Respondents.

Motion of Alviso Ad Hoc Committee for Leave to File a Brief Amicus Curiae in Support of Petition for Certiorari

DELIZONNA, BOURHIS & BOURHIS,
By HARRY J. DELIZONNA &
RAY L. BOURHIS,
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San Jose, California 95113
Attorneys for Amicus Curiae

SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

In the

Supreme Court of the United States

October Term, 1973

No.....

JESUS CANALES, et al.,

Petitioners,

vs.

CITY OF ALVISO AND CITY OF SAN JOSE,

Respondents.

Motion of Alviso Ad Hoc Committee for Leave to File a Brief Amicus Curiae in Support of Petition for Certiorari

The Alviso Ad Hoc Committee is a nonpartisan unincorporated association with membership consisting almost entirely of residents of and voters in the City of Alviso, California. It is engaged solely in the defense of the basic legal rights and interests of Alviso residents, qua residents, and especially those many City residents of Mexican ancestry. During its existence it has been particularly concerned with preserv-

ing fundamental democratic standards for the expression of popular will by Alviso residents in elections to determine whether the City of Alviso shall consolidate with the City of San Jose.

Resultantly, the Alviso Ad Hoc Committee is no less concerned that certain requirements of California Elections Code Section 20024 are unconstitutional on their face and as applied insofar as they place a constitutionally impermissible and logically impossible burden on election contestants, Petitioners herein. Such requirements compel Petitioners to establish not only that illegal votes were cast in the election at issue, and that such votes were cast in a number equal to or exceeding the differential between "yes" votes and "no" votes, but to prove that such votes actually determined the election.

The *amicus* brief of the Alviso Ad Hoc Committee in support of *Petition for Certiorari* raises two issues in the question presented before this Honorable Court. The first issue raised is whether, in an election contest won by a number of votes equalled or exceeded by the number of illegal votes cast therein, the burden placed on contestants under California Elections Code Section 20024 to prove that illegal votes actually determined the election violates the Fourteenth Amendment of the United States Constitution where the Court did not purge the polls but rather based its finding that contestants failed to meet their proof burden on mere circumstantial evidence.

The second issue is whether the right to vote is a fundamental constitutional right which therefore requires an independent review of the trial court's find-

ings by appellate courts, rather than review under the substantial evidence rule, which rule was applied in this case.

Amicus curiae believes the views they seek to present to this Court will contribute to a proper resolution of the troublesome issues before this Court and for the benefit of the voters for whom they seek to assure and guarantee not only a just and fair determination with respect to the election at issue, but also the preservation of their fundamental rights of suffrage under the Constitution of the United States.

WHEREFORE, the Alviso Ad Hoc Committee respectfully requests this court to permit them to file the brief *amicus curiae* as described herein.

Respectfully submitted,

DELIZONNA, BOURHIS & BOURHIS,
By HARRY J. DELIZONNA &
RAY L. BOURHIS,
Attorneys for Amicus Curiae

In the

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No.....

JESUS CANALES, et al.,

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Respondents.

Motion of Alviso Ad Hoc Committee for Leave to File a Brief Amicus Curiae in Support of Petition for Certiorari

AFFIDAVIT OF SERVICE

HARRY J. DELIZONNA, being first duly sworn, under oath, deposes and says:

1. That on the 25th day of January, 1974, three copies of the Motion of Alviso Ad Hoc Committee, *Amicus Curiae*, in Support of Petition for a Writ of Certiorari were mailed, postage prepaid, to:

CITY OF ALIVISO
FABER L. JOHNSTON, ESQ.
First National Bank Building, No. 711
San Jose, California 95113

CITY OF SAN JOSE
PETER G. STONE, ESQ.
City Attorney's Office
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JESUS CANALES, et al.

STEPHEN V. MANLEY, ESQ.
Community Legal Services
330 North Market Street
San Jose, California 95110

2. That all parties required to be served have been served.

Subscribed and sworn to before me this 25th day of January, 1974, at San Jose, California.

.....

HARRY J. DELIZONNA

Subscribed and sworn to before me this 25th day of January, 1974, at San Jose, California.

.....

NOTARY PUBLIC